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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1969

NO. 1297

EMERSON ELECTRIC CO., et al.,
Petitioners,

v.

J. R. FULTON, et al.,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI
To the United States Court of Appeals for the Fifth Circuit

PETITIONERS' REPLY TO RESPONDENTS' BRIEF IN OPPOSITION

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Respondents' Brief in Opposition to the Petition for a Writ of Certiorari is, in actuality, more in the nature of a brief on the merits, the thrust of which is to buttress our contention that this case requires the attention of this Court. Not only do Respondents not state any substantial reasons why this Court should not review this case, but on the contrary, throughout their brief, Respondents acknowledge that the issues in this case are of the highest degree of importance.

Respondents expressly concede that "this case presents delicate and far-reaching questions." (See Resp. Br. pp. 8, 11.) Respondents likewise admit that this case represents an attempt to create a new federal remedy for the enforcement of rights which are protected under §§ 7 and 8 of the National Labor Relations Act (29 U. S. C., §§ 157, 158). In sum, therefore, Respondents agree with the inescapable conclusion that this case presents vital questions in the administration of the national labor policy, which questions require resolution by this Court.

Lest our position be misconstrued (as Respondents have done, for example, at page 11 of their Brief), we reiterate that *as between the parties to this Petition for Certiorari*, this case is a labor dispute. This proposition is self-evident and needs no amplification. The fact that certain other rights or duties may be involved, or other parties joined as defendants, does not detract from the basic nature of the controversy between the company and the union organizers and employees.

Respondents argue that the holding of the Court of Appeals below is entirely consistent with *San Diego Building Trades Council v. Garmon,* 359 U. S. 236 (1959), and they desperately try to fit this case into one of the exceptions to *Garmon* which have been previously carved out by this Court. This attempt fails utterly, however, because the present case simply does not contain either the element of overriding state interest or the element of lack of fair representation, which would justify avoidance of the administrative agency charged by Congress with the responsibility of regulating labor disputes. Simply stated, this Court has never recognized a "civil rights" exception to the pre-emption doctrine.

The attempted unionization of an employer's plant is squarely protected by federal labor law and is directly within the domain of the NLRB. The purpopse of and

justification for the pre-emption doctrine was stated by this Court in *Vaca v. Sipes,* 386 U. S. 171, 180-81 (1967) to be:

> "The need to avoid conflicting rules of substantive law in the labor relations area and the desirability of leaving the development of such rules to the administrative agency created by Congress for that purpose."

The Court of Appeals' decision below is totally antithetical to the Congressional purpose and to the *raison d'etre* of the pre-emption doctrine.

It is very significant that all the approved exceptions to the *Garmon* doctrine to date have had their origin in this Court. This is as it should be. If there is to be an exception for the type of lawsuit brought by Respondents here, it should be sanctioned only after due deliberation by this Court of the merits of this case. For this reason, as acknowledged by Respondents, this case is of such proportion and importance as to require the attention and consideration of this Court.

In addition, this case presents a seeming conflict between two federal statutes, one enacted in 1871 to protect the rights of Negroes, and one passed in 1935 to secure the rights of employees. Yet Respondents, defying the repeated admonitions of this Court that labor disputes should be committed to the competence of the NLRB, expressly ask this Court to let stand the Court of Appeals' approval of the use of concurrent, parallel—and perhaps inconsistent—federal remedies. Respondents evidently contend that there is no way in which the two statutes can be reconciled, short of overlapping adjudications. This is a myopic view, for there are numerous civil rights disputes which in no way involve labor relations.

The potential ramifications of the judgment of the Court of Appeals, if sustained, are astounding. Astute labor

counsel could completely and effectively circumvent the National Labor Relations Board in virtually every instance of an alleged employer unfair labor practice, merely by filing suit in federal court and asserting that the employer's actions were taken "under color of state law."

Moreover, an even more disturbing possibility arises from the fact that Respondents below have contended that the "state action" requirement is no longer applicable to civil rights actions and that individual wrongdoing can be redressed in the federal courts. If this position is ever sustained, then every unfair labor practice charge could be referred to federal court, for the same basic reasons that Respondents are asserting jurisdiction in this case—deprivation of freedom of speech, freedom of association and/or due process of law. Certainly Respondents' "civil rights" argument could be made with reference to interference with organizational activities under §§ 7 and 8(a)(1); interference with the formation of a union under § 8(a)(2); discrimination based on speech or organizational activity under § 8(a)(3); discrimination based upon the giving of testimony or filing of charges under § 8(a)(4); or any refusals to bargain under § 8(a)(5). Thus, since all organizational and union activities have some "civil rights" overtones, the federal courts could be inundated with employee complaints which properly belong before the Labor Board.

In the interest of brevity, we have refrained from commenting on most of the inaccurate statements and editorial license contained in Respondents' Brief, including their attempt (p. 4) to amend the Complaint at this late date.

However, one particularly grievous error cannot pass unmentioned. At page 21 of their Brief, Respondents purport to quote from 29 U. S. C., § 523, which is part of

the Labor Management Reporting and Disclosure Act of 1959. In such quotation, Respondents omitted the language italicized below:

> ". . . except as explicitly provided to the contrary, nothing *in this chapter* shall take away any right or bar any remedy to which members of a labor organization are entitled under such other Federal law or law of any state."

Obviously, the limitations to "this chapter" refer to the 1959 Act and not to the National Labor Relations Act. This is confirmed by the "Historical Note" following § 523, which indicates that "this chapter" means Public Law 86-257, which is the Reporting and Disclosure Act of 1959.

CONCLUSION

The exception to the pre-emption doctrine created by the Court of Appeals in this case is the only judicially-created exception made by any court other than the United States Supreme Court. Because of the potential significance of such an exception and the possible emasculation of the National Labor Relations Board which could eventuate from the Court of Appeals' decision, this Court should grant the Petition for Certiorari and consider this matter on its merits.

Respectfully submitted

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